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ZAIBAR AUTO (MALAYSIA) SDN BHD

v.

COSMIC ANGLE TRAVEL & TOURS SDN BHD (NO 2)

B

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J
[COMPANIES WINDING-UP PETITION NO: D8-28-264-2008]
18 AUGUST 2008

C ***COMPANY LAW:*** *Winding up - Opposition to petition - Extension of time, application for - Discretionary power of court - Injustice or prejudice - Companies (Winding-Up) Rules 1972, rr. 30, 193, 194*

CIVIL PROCEDURE: *Time - Extension of time - Opposition to winding up petition - Discretionary power of court - Injustice or prejudice - Companies* D *(Winding-Up) Rules 1972, rr. 30, 193, 194*

This was an application for an extension of time by the respondent under r. 30 of the Companies (Winding-Up) Rules 1972 ('Rules') to oppose the petition presented by the petitioner to wind up the respondent under s. 218(1)(e) of the Companies Act 1965. The respondent had E filed an affidavit to oppose six weeks after being served with the petition and two days before the hearing of the petition, which contravened r. 30 of the Rules which requires seven days. The petitioner submitted that r. 30 of the Rules was mandatory in nature while the respondent relied on rr. 193 and 194 of the Rules.

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Held (allowing the application):

(1) The respondent in this case had only exceeded the time to file its affidavit to oppose under r. 30 of the Rules by four days, and the petition was served on the respondent only some six weeks earlier. G No injustice or prejudice could possibly be caused to the petitioner under the circumstances. Further, rr. 193 and 194 of the Rules are unavoidably "legislative in nature", and had it been intended that they should not be applied to r. 30 of the Rules the former would have said so in very clear terms. *Arab-Malaysian Merchant Bank* H *Bhd v. Orient Apparel Bhd* (foll).

Case(s) referred to:

Arab-Malaysian Merchant Bank Bhd v. Orient Apparel Bhd [1999] 2 CLJ 647 HC ***(foll)***

Arise Enterprise Sdn Bhd v. Feiyen Sanherk Hardware Sdn Bhd [2002] 5 CLJ 13 I *HC* ***(refd)***

Chen v. Kedah Marble Sdn Bhd [2002] MLJU 199 ***(refd)***

Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Bhd [1997] 3 CLJ 485 CA ***(refd)***
Unispan Formwork Sdn Bhd v. Kim Choy Tractor Works Sdn Bhd [2004] 4 CLJ 151 HC ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218(1)(e)
Companies (Winding-Up) Rules 1972, rr. 30, 193, 194

For the petitioner - Ng Li Lin; M/s Sheah, Tan & Rahman
For the respondent - K Periasamy; M/s Periasamy & Co

Reported by Suresh Nathan

JUDGMENT

Kang Hwee Gee J:

This Is My Oral Judgment: (*ex-tempore*)

[1] This is an application for an extension of time by the respondent under r. 30 of the Companies (Winding-Up) Rules 1972 to oppose the petition presented by the petitioner to wind up the respondent under s. 218(1)(e) of the Companies Act 1965. The respondent had filed an affidavit to oppose, six weeks after being served with the petition and two days before the hearing of the petition, which contravenes r. 30 which requires seven days.

Miss Ng Li Lin for the petitioner:

1. See *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank Bhd* [1997] 3 CLJ 485 (dist) - Rule 30 is mandatory in nature.

Mr. K. Periasamy for the respondent:

1. There is a saving provision r. 193 and also r. 194 which state as follows:

> 193. The Court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.
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> 194. (1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court.

A (2) No defect or irregularity in the appointment or election of a receiver, liquidator, or member of a committee of inspection shall vitiate any act done by him in good faith.

2. See *Arab-Malaysian Merchant Bank Bhd v. Orient Apparel Bhd* [1999] 2 CLJ 647 followed in a number of other cases.

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Findings And Decision

[2] There is a divergence of views as to whether r. 30 of the Companies (Winding-Up) Rules 1972 as interpreted by the Court of Appeal in *Crocuses* is subject to the discretionary power of the court under rr. 193 and 194.

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[3] Whereas in *Arab-Malaysian Merchant Bank Bhd v. Orient Apparel Bhd, supra*, the Ipoh High Court held that r. 30 can be condoned under the r. 194 (read with Rule 193), in *Unispan Formwork Sdn Bhd v. Kim Choy Tractor Works Sdn Bhd* [2004] 4 CLJ 151, Alizatul Khair Osman JC (as she then was) in dismissing the respondent's application for adjournment for the purpose of filing an affidavit to oppose the petition out of time expressed her view that r. 194 is inapplicable in so far as r. 30 is concerned as follows:

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> With respect to the views expressed in the abovesaid cases, Rule 194 is to my mind a saving clause which seeks to preserve the validity of winding-up proceedings in the event of any formal defect or irregularity unless the court is of the opinion that substantial injustice has been caused by such defect or irregularity. As to what amounts to a formal defect or irregularity under r. 194(1) can perhaps be gleaned from r. 194(2) which provides that no defect or irregularity in the appointment or election of a receiver, liquidator or member of a committee of inspection shall vitiate any done by him in good faith.

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> Rule 194(1) thus envisages a defect or irregularity which is technical in nature such as the premature swearing of an affidavit (see *Sam Hin Timber Co v. Perusahaan Sri Duyong Sdn Bhd* [1983] 2 CLJ 269; [1983] CLJ (Rep) 838), imprecise details in the petition (see *Lix Industries Sdn Bhd v. Greenworld Industry Sdn Bhd* [1998] 1 LNS 373; [1998] 7 MLJ 403) or the failure to state the amount claimed in the petition (see *PT Anekapangan Dwitama v. Far East Food Industries Sdn. Bhd.* [1998] 4 CLJ Supp 437). In all these cases the court held that the defect or irregularity is purely formal and therefore curable under r. 194(1). Rule 194(1) does not in my view apply to the present case. Here, the issue is whether the court has power to extend or abridge the time for filing the affidavit in opposition as required by r. 30(1). Although r. 193 of the Winding-up Rules (which is the relevant provision in this case) empowers the court to grant such extension or abridgement, the Court of Appeal in ruling as it did that r. 30 is mandatory in nature has indirectly (in my view) ruled that r. 193 does not admit the exercise of such discretion in the case of affidavits filed under r. 30.

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[4] Rule 30 itself (to adopt Hart's Concept of Law) is a rule with an "open texture" in that it leaves open the effect of non compliance and instead provides the court in rr. 193 and 194 with the discretion to moderate its effect as it sees fit to extend or abridge time where to do so would not cause substantial injustice.

[5] I would therefore stick to the views expressed in *Arab-Malaysian Merchant Bank Bhd v. Orient Apparel Bhd* which reads:

> Having read *Croucuses* carefully it would appear to me that all the Court of Appeal had ruled in that case was that r. 30 was mandatory in nature. It did not however consider the power of the court to condone the irregularity under r. 194(1) of the Companies (Winding-up) Rules 1972 which provides that no proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity unless the court is of the opinion that substantial injustice has been caused by the defect or irregularities and that the unjustice cannot be remedied by any order of the court. It follows therefore the Court of Appeal's decision in *Crocuses* must be construed to apply only to the factual pecularity of that case.
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> In the instant case, it is clear to me that the irregularity did not cause any injustice to the petitioner in any way – the opposers being merely two or three days out of time. The delay was inconsequential to the process of the petition and could be safely condoned under r. 194(1). I would not therefore preclude their representation in this petition.

[6] The decision in Arab-Malaysian Merchant Bank Bhd was followed in *Chen v. Kedah Marble Sdn. Bhd* [2002] MLJU 199 and *Arise Enterprise Sdn Bhd v. Feiyen Sanherk Hardware Sdn Bhd* [2002] 5 CLJ 13.

[7] I would add that rr. 193 and 194 are unavoidably 'legislative in nature'. Had it been intended that they should not be applied to r. 30 the former would have said so in very clear terms.

[8] The respondent in this case had only exceeded the time to file its affidavit to oppose under r. 30 by four days and the petition was served on the respondent only some six weeks earlier. No injustice or prejudice could possibly be caused to the petitioner under the circumstance.

[9] The application is allowed with no order as to costs.